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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/042,990	01/09/2002	Geza Bruckner	22740-1A	7684
24256	7590	04/09/2004	EXAMINER	
DINSMORE & SHOHL, LLP 1900 CHEMED CENTER 255 EAST FIFTH STREET CINCINNATI, OH 45202			WEBMAN, EDWARD J	
			ART UNIT	PAPER NUMBER
			1617	

DATE MAILED: 04/09/2004

Please find below and/or attached an Office communication concerning this application or proceeding.



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APPLICATION NUMBER	FILING DATE	FIRST NAMED APPLICANT	ATTY. DOCKET NO.
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10/042990

EXAMINER

ART UNIT	PAPER NUMBER
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3/18/04

DATE MAILED:

This is a communication from the examiner in charge of your application.
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OFFICE ACTION SUMMARY

☒ Responsive to communication(s) filed on 12/04/03

☒ This action is FINAL.

☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 D.C. 11; 453 O.G. 213.

A shortened statutory period for response to this action is set to expire 3 month(s), or thirty days, whichever is longer, from the mailing date of this communication. Failure to respond within the period for response will cause the application to become abandoned. (35 U.S.C. § 133). Extensions of time may be obtained under the provisions of 37 CFR 1.136(a).

Disposition of Claims

- ☒ Claim(s) 48 - 71, 73-74 is/are pending in the application.
Of the above, claim(s) 50-52, 56, 61, 66-68, 70 is/are withdrawn from consideration.
☐ Claim(s) is/are allowed.
☒ Claim(s) 48, 49, 53-55, 57-60, 62-65, 69, 71, 73-74 is/are rejected.
☐ Claim(s) is/are objected to.
☐ Claim(s) are subject to restriction or election requirement.

Application Papers

- ☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.
☐ The drawing(s) filed on _____ is/are objected to by the Examiner.
☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.
☐ The specification is objected to by the Examiner.
☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119

- ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
☐ All ☐ Some* ☐ None of the CERTIFIED copies of the priority documents have been
☐ received.
☐ received in Application No. (Series Code/Serial Number) _____
☐ received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

*Certified copies not received: _____

- ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e).

Attachment(s)

- ☐ Notice of Reference Cited, PTO-892
☐ Information Disclosure Statement(s), PTO-1449, Paper No(s). _____
☐ Interview Summary, PTO-413
☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
☐ Notice of Informal Patent Application, PTO-152

--SEE OFFICE ACTION ON THE FOLLOWING PAGES--

Applicants' argument regarding whether claim 72 is non-elected is moot in view of its cancellation.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 48, 49, 53-55, 57-60, 69, 71, 73-74 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jackson et al. (WO 98/04248) in view of Fort (translated DE 29805782u1).

Jackson et al. Teach a dietary supplement composition for postmenopausal women containing 1-50 mg phytoestrogen (abstract; page 7, line 27; and page 27, line 30). Genistein is specified (page 26, line 5). The composition may be formulated with cereal (page 27, line 11). Phytoestrogen obtaining from soybean is disclosed (page 27, line 30; and claim 47).

However, Jackson et al. do not teach carnitine.

Fort teaches a dietary cereal containing carnitine (title, abstract, page 5 line 15). Support of heart muscle activity and increasing stability against physical stress (page 4 lines 10-13).

It would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made to add carnitine to the composition of Jackson et al. to achieve the beneficial effect of supplementing the dietary needs for post-menopausal

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women by supporting heart muscle activity and increasing stability against physical stress in view of Fort.

As to the claimed weight percent, it is within the skill in the art to select optimal parameters such as ratios or weight percents of components in order to achieve a beneficial effect. See In re Boesch, 205 USPQ 215 (CCPA 1980). Therefore, the ratios or weight percents instantly claimed are not considered critical absent evidence showing unexpected and superior results.

As to the claimed instructions, such is merely printed matter not considered a patentable limitation in claims to a composition. See MPEP 70603 (a) under "Printed Matter".

In response to applicant's argument that they now claim PET FOOD, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963).

As to applicants Printed Matter argument, taken as a whole, the claimed instructions are directed to the intended use, and, therefore, do not render the claims distinguishable over the prior art.

The examiner takes notice under MPEP 2144.03 that it is well-known, even to the layman, that PET FOOD is consumable by humans.

The foreign patent documents cited on form PTO 1449 in the IDS filed 12/8/03 are not of record.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication should be directed to Edward J. Webman at telephone number 571-272-0633.

Webman/tgd

March 22, 2004



EDWARD J. WEBMAN
PRIMARY EXAMINER
GROUP 1500